

7550-01

NATIONAL MEDIATION BOARD

29 CFR Parts 1203 and 1206

[Docket No. C -7198]

RIN 3140-AA01

Decertification of Representatives

AGENCY: National Mediation Board.

ACTION: Proposed rule with requests for comments.

SUMMARY: The National Mediation Board (NMB or Board) is proposing to amend its regulations to provide a straightforward procedure for the decertification of representatives. The Board believes this change is necessary to fulfill the statutory mission of the Railway Labor Act, protecting employees' right to select their representative. This change will ensure that each employee has a say in their representative and eliminate unnecessary hurdles for employees who no longer wish to be represented.

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. A public hearing will be held at 10 a.m. in Washington, D.C. at a date and location to be announced later.

ADDRESSES: You may submit comments, identified by Docket No. C-7198, by any of the following methods:

- Federal eRulemaking Portal: <http://regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.nmb.gov>. Follow the instructions for submitting comments.

- Email: legal@nmb.gov. Include Docket No. C-7198 in the subject line of the message.
- Fax: (202) 692-5085
- Mail and Hand Delivery: National Mediation Board, 1301 K Street, N.W., Ste. 250E,
Washington, D.C. 20005

Instructions: All submissions received must include the agency name and docket number. All comments received will be posted without change to <http://www.nmb.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.nmb.gov>.

FOR FURTHER INFORMATION CONTACT: Mary Johnson, General Counsel, National Mediation Board, (202) 692-5040, legal@nmb.gov.

SUPPLEMENTARY INFORMATION:

The Railway Labor Act (RLA), 45 U.S.C. 151 et seq. establishes the NMB whose functions, among others, are to administer certain provisions of the RLA with respect to investigating disputes as to the representative of a craft or class. In accordance with its authority under 45 U.S.C. 152, Ninth, the Board has considered changes to its rules to better facilitate the statutory mission to investigate representation disputes “among a carrier’s employees as to who are the representatives of such employees.”

Currently, while employees have the ability to decertify a representative under the RLA, the process to decertify is unnecessarily complex and convoluted. By failing to have in place a straight-forward process for decertification of a representative, the Board is maintaining an unjustifiable hurdle for employees who no longer wish to be represented and failing to fulfill the statutory purpose of “freedom of association among employees.” 45 U.S.C. 151a(2).

Unlike the National Labor Relations Act, the RLA has no statutory provision for decertification of a bargaining representative. The Supreme Court, however, has held that, under Section 2, Fourth, 45 USC 152, Fourth, employees of the craft or class “have the right to determine who shall be the representative of the group or, indeed, whether they shall have any representation at all.” *Bhd. of Railway and Steamship Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 US 650, 670 (1965)(ABNE). In ABNE, the Court further noted that the legislative history of the RLA supports the view that employees have the option of rejecting collective representation. *Id.* at 669. *citing* Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 34-35. In *International Brotherhood of Teamsters v. Bhd. of Railway, Airline and Steamship Clerks*, the United States Court of Appeals for the District of Columbia (DC Circuit), stated that “it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation. On its face that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit.” 402 F.2d 196, 202 (1968), *See also Russell v. National Mediation Board*, 714 F.2d 1332 (1983).

Under its current procedures, the NMB allows indirect rather than direct decertification. The Board does not allow an employee or a group of employees of a craft or class to apply for an election to vote for their current representative or for no union. Employees who wish to become unrepresented must follow a more convoluted path to an election because of the Board’s requirement of the “straw man.” This straw man requirement means that if a craft or class of employees want to decertify, they must find a person willing to put their name up, i.e. “John Smith,” and then explain to at least fifty percent of the workforce that John Smith does not want to represent them, but if they want to decertify they have to sign the card authorizing him to

represent them. Thus, in order to become unrepresented, employees are required to first sign an authorization card to have a strawman step in to represent them. In the resulting election, the ballot options will include the names of the current representative; John Smith, the strawman applicant; “no union;” and an option to write in the name of another representative. To decertify, employees have to vote for no representation.

It is NMB’s statutory mandate to protect employees’ freedom to choose a representative. There is, however, no statutory basis for the additional requirement of a straw man where employees seek to become unrepresented. Both courts and the Board have recognized that inherent in the right to representation is the right to be unrepresented. Accordingly, the Board proposes changing its rules to simplify the decertification process and put decertification on an equal footing with certification. Employees may submit authorization cards to decertify their current representative. The wording on the card must be unambiguous and clearly state the intent to no longer be represented by the current union. The showing of interest requirement will be the same showing of interest required for a certification election – at least 50 percent of the craft or class.

The necessity of a straw man will be eliminated, and the ballot will no longer include a strawman representation choice. Once it is determined that the showing of interest is valid and sufficient, the Board will authorize the election with the incumbent and the no representation option, along with a write-in option. The Board’s existing run-off rules will apply.

Successful decertification, like certification, is a challenging and significant undertaking by employees with a substantial impact on the workplace for both employees and their employer. In the Board’s view, the changes in the employee-employer relationship that occur when employees become represented, change representative or become unrepresented require

similar treatment. For this reason, the Board proposes extending the two year time limit on applications in Sec. 1206.4(a) to decertifications as well as certifications. The other time limits set forth in 1206.4 will remain unchanged.

Member Puchala dissents from the Board majority's action in approving the proposed rule.

EXECUTIVE ORDER 12866

This rule is not a significant rule for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

REGULATORY FLEXIBILITY ACT

As required by the Regulatory Flexibility Act, the NMB certifies that these regulatory changes will not have a significant impact on small business entities. This rule will not have any significant impact on the quality of the human environment under the National Environmental Policy Act.

PAPERWORK REDUCTION ACT

The NMB has determined that the Paperwork Reduction Act does not apply because this interim regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

LIST OF SUBJECTS.

29 CFR Part 1203

Air carries, Labor management relations, Labor unions, Railroads.

29 CFR Part 1206

Air carriers, Labor management relations, Labor union, Railroads.

For the reasons stated in the preamble, the National Mediation Board proposes to amend 29 CFR Chapter X as set forth below:

PART 1203 - - APPLICATIONS FOR SERVICE

1. The authority citation for part 1203 continues to read as follows:

Authority: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

2. Revise § 1203.2 to read as follows:

§ 1203.2 Investigation of representation disputes.

Applications for the services of the National Mediation Board under section 2, Ninth, of the Railway Labor Act to investigate representation disputes among carriers' employees may be made on printed forms NMB-3, copies of which may be secured from the Board's

Representation and Legal Department or on the Internet at www.nmb.gov. Such applications and all correspondence connected therewith should be filed in duplicate and the applications should be accompanied by signed authorization cards from the employees composing the craft or class involved in the dispute. The applications should show specifically the name or description of the craft or class of employees involved, the name of the invoking organization or individual seeking decertification, the name of the organization currently representing the employees, if any, and the estimated number of employees in each craft or class involved. The applications should be signed by the chief executive of the invoking organization, some other authorized officer of the organization, or an individual seeking decertification. These disputes are given docket numbers in the series "R".

PART 1206 - - HANDLING REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

1. The authority citation for part 1206 continues to read as follows:

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

2. Amend § 1206.1 by revising paragraph (b) to read as follows

§ 1206.1 Run-off elections.

* * * * *

(b) In the event a run-off election is authorized by the Board, the two options which received the highest number of votes cast in the first election shall be placed on the run-off ballot. No blank line on which voters may write in the name of any organization, individual, or no representation will be provided on the run-off ballot.

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3. Amend § 1206.2 by revising paragraph (a) to read as follows:

§ 1206.2 Percentage of valid authorizations required to determine existence of a representation dispute.

(a) Upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, or to decertify the current representative and have no representative, a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least fifty (50) percent of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

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4. Amend § 1206.4 by revising paragraph (a) to read as follows:

§ 1206.4 Time Limits on Applications

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(a) For a period of two (2) years from the date of a certification or decertification covering the same craft or class of employees on the same carrier, and

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5. Redesignate §§ 1206.5 through 1206.7 as §§ 1206.6 through 1206.8 and add new § 1206.5 to read as follows:

§ 1206.5 Decertification of Representatives.

Employees who no longer wish to be represented may seek to decertify the current representative of a craft or class in a direct election. The employees must follow the procedure outlines in § 1203.2.

Dated: January 28, 2019

Mary L. Johnson

General Counsel

[FR Doc. 2019-00406 Filed: 1/30/2019 8:45 am; Publication Date: 1/31/2019]